

No. 93-1462

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In The
Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Petitioners,

v.

JOSE RAMON MORALES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws contained in Article I, section 9, clause 3 and Article I, section 10 of the U.S. Constitution?

LIST OF PARTIES

Petitioners are the California Department of Corrections, a state department which administers state prisons and other correctional programs; the Attorney General of the State of California, a California constitutional officer who is the chief law enforcement officer of the state; the California Board of Prison Terms, a state board which determines the terms, conditions, and dates of parole for adult state prisoners; and E.R. Meyers, the warden of the institution where respondent was incarcerated at the time respondent filed the underlying petition for a writ of habeas corpus.

Respondent is a state prisoner who was convicted of murder in 1971 and 1982.

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OPINION BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported as *Morales v. Cal. Dept. of Corrections*, 16 F.3d 1001 (9th Cir. 1994) and is reprinted in Appendix A of the Petition for Certiorari.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. § 1254(1) and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Clause three, section nine, Article I of the U.S. Constitution states:

No bill of attainder or ex post facto law shall be passed.

Clause one, section ten, Article I of the U.S. Constitution states:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

STATE STATUTE INVOLVED

The statute involved is subdivision (b) of California Penal Code § 3041.5, a provision enacted in 1977. The 1977 version of section 3041.5(b)(2) (Jt. App. at 3) stated:

Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting

forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated. The board shall hear each case annually thereafter.

This version was effective until 1982. Jt. App. at 6. As amended, subdivision (b)(2) read as follows:

Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

In 1990, the provision was amended (Jt. App. at 9) to read:

The Board shall hear each case annually thereafter, except the board may schedule the next hearing no later than the following:

. . . (B) Three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking

of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

In addition to the above, the principal effect of the 1990 amendment was to add a five-year deferral for those who had been convicted of more than two murders.¹ Jt. App. at 14.

On January 1, 1995, section 3041.5(b)(2)(B) will read as follows (Jt. App. at 17):

Up to five years after any hearing at which parole has been denied if the prisoner has been convicted of murder, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding in writing. If

¹ The uncodified second section of the bill contained the following provision which limited the application of the five-year provision (Jt. App. at 14):

The amendments to Section 3041.5 of the Penal Code made by this act shall be applicable only to offenses committed before July 1, 1977, or on or after January 1, 1991.

It appears that the only change to the three-year provision made by the bill was the capitalization of the initial "t" of the paragraph. See Jt. App. at 9. Therefore, it is unlikely that the uncoded second section of the bill was meant to apply to any "amendments" other than the new five-year provision. The bill summary, immediately after a discussion of the new five-year provision (Jt. App. at 11), states that the "bill would also make *this* provision applicable only to offenses committed before July 1, 1977, or on or after January 1, 1991 [emphasis added]." Jt. App. at 12. The intent of the drafters was obviously to limit retroactive application of the new five-year provision alone.

the board defers a hearing five years, the prisoner's central file shall be reviewed by a deputy commissioner within three years at which time the deputy commissioner may direct that a hearing be held within one year. The prisoner shall be notified in writing of the deputy commissioner's decision. The board shall adopt procedures that relate to the criteria for setting the hearing between two and five years.

This amendment eliminates the three-year provision and authorizes a delay of up to five years between suitability hearings. There is no uncoded provision in the bill.

STATEMENT OF THE CASE

a. Factual background.

A bare recitation of the relevant facts is made in the first section of the Ninth Circuit opinion. In 1971, respondent was convicted of first degree murder. After being transferred to a half-way house in April 1980, he married. He was paroled in May 1980 and his wife disappeared two months later and her hand was found on a freeway. Her body was never recovered. Appendix A, Cert. Pet. at 1571; *Morales, supra* at 1002.

The 1982 probation report (Exhibit to Rtn., Supp. App. B, Cert. Pet. at 63-65) states:

The victim in the [murder was] a 75-year-old . . . whom [respondent] met when she visited prison inmates. She had visited [respondent] frequently in prison . . . and . . . tried to convert him to her religion, Christian Science. After [respondent] was transferred to Los Angeles to

a [prison] half-way house on April 14, 1980 in anticipation of his upcoming parole, she visited him in Los Angeles for one day on April 30, 1980 and secretly married him. On July 4, 1980 she left her mobile home . . . and told friends that she was moving to Los Angeles to live with her husband. Later that day she bought gas in Los Angeles and was never seen alive again. . . .

After the hand was found it was learned that [respondent] had obtained possession of the deceased's vehicle and had used her credit cards, forging her name. . . . At the time of the arrest [respondent] was in possession of the deceased's car, her purse, credit cards, and her diamond rings. [Her] body has never been found.

Id. at 65. The victim's son stated that a diamond ring found in respondent's possession belonged to his mother.

Id. at 64.

Respondent pleaded no contest to second degree murder of his wife. The probation officer concluded:

. . . [T]o regard [respondent] as anything less than a deliberate, calculating, cold-blooded murderer would be untenable. . . . [T]here can be no uncertainty regarding the cruelty he exhibited in both of the murders of which he has been convicted and in both of which he denies guilt. . . .

The danger [respondent] presents cannot be overemphasized and in the best interests of society, it is hoped that he will remain in prison for the rest of his life. If and when parole is ever considered it is hoped that those persons responsible for making this decision will remain

cognizant of [respondent's] proven violence and resist whatever manipulative techniques he may devise in the future.

Id. at 70-72.

Respondent's initial parole consideration was held on July 15, 1989. The California Board of Prison Terms found respondent unsuitable for parole and set a hearing three years in the future. The relevant portion of the August 22, 1989 parole suitability report (Exhibit to Rtn., Supp. App. B, Cert. Pet. at 45-46) states:

1. Commitment offense. The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense and the motive of the crime is very trivial in relation to the offense. . . .

2. Previous record. The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. He has an unstable social history, he has failed previous grants of parole and he cannot be counted upon to avoid criminality. He has failed to profit from society's previous attempts to correct his criminality which include being on parole and then committing another offense.

The prisoner has an unstable social history and prior criminality which includes being found guilty of first degree[] murder, later being granted parole and then committing a second murder. Both being female victims intimately associated with the prisoner.

3. Institutional behavior. The prisoner has programmed in a limited manner while incarcerated and he has not participated in beneficial self-help or therapy programs.

4. Psychiatric factors. . . . The reports state[] as follows:

"A characteristic of an individual with this diagnosis is to avoid conflict whenever possible, but when 'against the wall' to quickly revert to primitive, often violent, behavior, sometimes with little or no recollection of the violent event."

"If parole is to be considered it is felt that his violence potential is greater than the average inmate because of his two murders." [Emphasis added.]

The panel finds the prisoner needs therapy in order to face, discuss, understand and cope with his past criminal behavior and reasons for the life crime. Until progress is made, he continues to be unpredictable and a threat to others.

The prisoner needs therapy in a controlled setting, but his motivation and amenability are questionable. . . .

Based on the information contained in the record and considered at the hearing, the panel concludes and states, as is required by PC sections 3043 and 3043.5, that the prisoner would pose a threat to public safety if released on parole.

Therefore, the prisoner is found unsuitable for parole.

The particular reasons for not having a parole suitability hearing in the next year were then set forth (*id.* at 47):

In addition to the foregoing reasons supporting postponement of parole consideration, the panel also specifically finds that it is not reasonable to expect that parole would be granted at a hearing scheduled earlier based on the following facts:

1. The prisoner committed the offense in an especially heinous, atrocious and cruel manner wherein he mutilated the victim's body after causing said death and, as such, requires a longer period of observation and/or evaluation before the Board can project a parole date.

2. The prisoner has a prior record of violent behavior, to wit, he was convicted of first degree murder in 1970.

3. In view of the prisoner's long history of criminality and misconduct, which includes the aforementioned murder, a longer period of time is required to evaluate his suitability.

4. The recent Psychiatric Evaluations . . . indicated a need for a longer period of observation and evaluation or treatment. The next hearing will be scheduled in three years.

b. Procedural background.

Respondent filed his petition for habeas corpus in the district court for the Central District of California on December 26, 1991. He alleged in pertinent part that he was the victim of an ex post facto change in the frequency of the parole consideration hearings. Appendix A, Cert.

Pet. at 1571-2; *Morales, supra* at 1002-1003. On December 27, 1991, the district court issued an order to show cause re the petition.

The return was filed on February 24, 1992. On May 18, 1992, the magistrate judge issued a report which recommended the denial of all issues save the parole issue presented in this Petition. Supp. App. C, Cert. Pet.

On August 20, 1992, the district court issued an order and judgment rejecting the ex post facto claim and dismissing the entire petition. Supp. App. D, Cert. Pet. A certificate of probable cause issued on September 24, 1992. Supp. App. D, Cert. Pet. The February 9, 1994 opinion of the Ninth Circuit is set forth in Appendix A, Cert. Pet.

The petition for certiorari was filed on March 7, 1994. The petition was granted on September 26, 1994.

SUMMARY OF THE ARGUMENT

The Ninth Circuit opinion below holds that despite the fact that parole suitability hearings are convened solely to gauge the *fitness* of an inmate to have a parole hearing which in turn *might* result in the setting of a parole date for certain felons with indeterminate sentences, a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws. The circumstances of this case indicate that the Ninth Circuit has not engaged in the basic analysis set forth by this Court in *Weaver v. Graham*, 450 U.S. 24, 32 (1981) and has relied on a series of suppositions

about potential detriment to respondent which are totally without rational basis. In view of the national trend² towards the implementation of harsher penalties and conditions of confinement for offenders and inmates, it is necessary for this Court to reexamine the black-letter test set forth in *Weaver* and restate the nature and quality and burden of proof required to make a showing of detrimental impact as to an ex post facto claim.

ARGUMENT

AMENDMENT OF A LAW GOVERNING THE FREQUENCY OF PAROLE ELIGIBILITY HEARINGS TO PERMIT POSTPONEMENT OF ANNUAL HEARINGS WITHIN THE DISCRETION OF THE BOARD IS NOT AN EX POST FACTO LAW

In the instant case, the Ninth Circuit held that the 1981 amendment of section 3041.5(b)(2) was an ex post facto law as to respondent. In doing so, the Ninth Circuit found that the 1981 amendment "denied Morales opportunities for parole that existed under prior law, thereby making [his] punishment . . . greater than it was under the law in effect at the time his crime was committed." Appendix A, Cert. Pet. at 1574; *Morales, supra* at 1004. Whether those "opportunities" were substantial and detrimental under the second prong of *Weaver v. Graham*, 450 U.S. 24, 32 (1981) is the central issue of this case.

² Recent volumes of the Federal Reporter overflow with new ex post facto cases. E.g. *U.S. v. Couch*, 28 F.3d 711 (7th Cir. 1994); *U.S. v. Moore*, 27 F.3d 969 (4th Cir. 1994).

The Ninth Circuit found that the 1981 amendment was detrimental to respondent because it assumed that the greater the number of parole hearings, the greater the probability of parole:

Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the *ex post facto* clause.

Id. The syllogism is flawed and the Ninth Circuit opinion falls with the syllogism. *Weaver* requires proof by the inmate that he has been disadvantaged (*Weaver v. Graham*, *supra* at 29), not speculation and supposition of harm.

a. The 1977 enactment of the California Determinate Sentencing Law.

Prior to July 1, 1977, California law did not require annual parole suitability hearings. *In re Jackson*, 703 P.2d 100, 101 (Cal. 1985). On July 1, 1977, the determinate sentencing law (DSL)³ went into effect and set the stage for the instant case. See generally *Way v. Superior Court*, 141 Cal.Rptr. 383, 386-387 (Cal.Ct.App. 1977); *People v. Community Release Board*,⁴ 158 Cal.Rptr. 238, 240 (Cal.Ct.App. 1979).

³ The main feature of the law, determinate sentencing from a range of three sentence terms for crimes committed in the future, does not affect this case. California Penal Code § 1170.

⁴ The Community Release Board was the predecessor to the current Board of Prison Terms. The Board determines parole suitability for California state prison inmates and is authorized by California Penal Code § 5075 *et seq.*

Those who had received a life sentence prior to 1977 were dealt with under California Penal Code § 1170.2(e). That section states:

In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1168 [indeterminate life sentencing] if the felony was committed on or after July 1, 1977, the Board of Prison Terms shall provide for release from prison as provided by this code.

The Board's duties and the procedural steps with regard to parole are set forth in pertinent part in California Penal Code § 3041.5. The instant case centers on subdivision (b) of that section, relating to the frequency of parole eligibility hearings, as it was enacted in 1977 and as it was subsequently amended for multiple murderers in 1981.

b. The 1981 amendment to California Penal Code § 3041.5(b).

Between 1977 and 1981, annual parole eligibility hearings were required by section 3041.5(b)(2). In pertinent part, that provision then read: "The board shall hear each case annually thereafter." In 1981, subdivision (b) of that section was amended to permit hearings every second or third year for multiple murderers within the Board's discretion, if the requisite findings were made.

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

These amendments concern those who stand convicted of more than one offense which involve the taking of a life. The net effect was to delete annual parole eligibility hearings, *not parole itself*, and substitute a hearing within three years for those whom the Board found did not possess a reasonable expectation of parole in the intervening years. *The statute plainly states that annual suitability hearings would be held and that extension of the hearings would occur if and only if the proper discretionary findings could be made by the Board.*

c. Caselaw exploring the ex post facto ramifications of subsequent amendments to section 3041.5.

1. Interpretation of the 1982 amendment to section 3041.5 as a prologue to judicial interpretation of the 1981 amendment.

The first major case exploring the ex post facto ramifications of the enactment of the determinate sentencing law involved a 1982 amendment not affecting respondent in the instant case. *In re Jackson, supra*. In 1982, section 3041.5(a) was amended to permit hearings every two

years for all inmates sentenced under the determinate sentencing law with no parole dates. The procedure for all eligible inmates in 1982 and after was as follows:

The parole considerations procedures are governed by section 3040 et seq. and apply to all inmates not serving a determinate sentence [i.e. without a determinate term pronounced by the sentencing court]. (Section 1170 et seq.; see sections 3041, 3000.) Once such an inmate has served sufficient time to be eligible or soon eligible for parole, he or she receives notice that a parole suitability hearing before a Board hearing panel will be held. (Sections 3041, 3041.5, 3042.) [Various procedural rights, including the right to counsel, apply.] (Sections 3041.5, 3041.7, 3042; Cal.Admin.Code, tit. 15, sections 2245-2256.)

In re Jackson, supra at 102. Following the hearing, the Board must set a date for release on parole unless it makes certain findings and if it does make detrimental findings, another hearing is set for the next year unless the Board makes other detrimental findings. California Penal Code § 3041.5(a). In that instance, the next hearing will be in two years.

Jackson involved a claim by an inmate who was convicted in 1961. At that time, there was no provision for annual hearings. He appeared at an initial 1983 hearing and was found unsuitable for parole. His next hearing was scheduled for two years hence under the 1982 amendment. *Jackson*, on state habeas corpus, claimed that he was entitled to annual review under the 1977 procedures. The California Supreme Court found that the change from one-year to two-year hearings was not an ex post facto law:

Although the issue is close, this court holds that the 1982 amendment is a procedural change outside the purview of the ex post facto clause. The amendment did not alter the criteria by which parole suitability is determined. . . . Nor did it change the criteria governing an inmate's release on parole. . . . Most important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing. . . . *Instead, the 1982 amendment changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability . . . This change did eliminate the possibility that a parole date would be set within the period of postponement. However, the likelihood that the postponement actually delays release on parole until after the next hearing appears slight.* [Emphasis added.]

In re Jackson, supra at 105. The California Supreme Court noted that the presence of counsel and the numerous procedural safeguards at the parole hearing provided "insurance that any postponement decision [would] be well-founded." *Id.* at 106.

Crucial to the *Jackson* decision are legislative findings which show that the effect of delaying the hearings was slight.

The two legislative committee analyses which were prepared while the 1982 amendment was pending in the Legislature provide some insight on this point. At the initial parole suitability hearing, which occurs one year before an inmate's minimum eligible parole date (section 3041), 90 percent of inmates are found unsuitable for parole release. At the second and subsequent parole suitability hearings, approximately 85 percent are found unsuitable. . . . In view of

these statistics, the 1982 amendment was seen as a means "to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released."

Id. at 106. Moreover, the *Jackson* case involved a finding of unsuitability for parole. The record contained no evidence "as to how often, if ever, a determination of parole suitability results in an inmate's release on parole soon after a suitability determination. [Emphasis in original.]"

Such evidence would obviously be relevant to whether inmates are actually disadvantaged – in terms of serving longer prison terms – as a result of a hearing postponement.

Id. Unlike the changed computation of eligibility in *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1100, only the frequency of parole suitability hearings was affected by the 1982 amendment. *In re Jackson*, supra at 108. Unlike the "gain-time" credits in *Weaver v. Graham*, 450 U.S. 24 (1981), there was no certain release date to be affected by the amended law in question. *In re Jackson*, supra at 107. In sum, there was no certain release date to be affected by the amendment and no evidence of any untoward effect on any possible release date.

2. Judicial construction of the 1981 amendment.

The instant case is an attempt to address a problem similar to that explored in *Jackson*, the ex post facto ramifications of the 1982 amendment. Here an inmate

who was clearly entitled to annual hearings at the time of his offense, the offense having occurred after 1977, but who committed the offense prior to the 1981 amendment regarding multiple taking of lives, claims that the 1981 amendment materially increases his punishment and is therefore an *ex post facto* law. In this situation, *Weaver* commands an inquiry into whether a retrospective state statute ameliorates or worsens conditions imposed by its predecessor. *Weaver v. Graham*, *supra* at 33. Notwithstanding the plain requirement of detriment set forth in *Weaver*, *Morales* states that because an eligibility hearing is a precedent to parole, fewer hearings mean a smaller chance of obtaining parole.

Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the *ex post facto* clause. [Emphasis added.]

Appendix A, Cert. Pet. at 1574; *Morales*, *supra* at 1004. Such an assumption does violence to the structure of state law and to the nature and burden of proof in *ex post facto* litigation. *Morris v. Castro*, 212 Cal.Rptr. 299, 302 (Cal.Ct.App. 1985).

The Ninth Circuit error in this case tracks *Roller v. Cavanaugh*, 984 F.2d 120, 123 (4th Cir. 1993), *cert. granted* 113 U.S. 2412 *cert. dm.* 114 S.Ct. 593. *Roller* first declares that there is a conflict among the circuits as to the *ex post facto* effect of diminishing the number of parole eligibility hearings:

Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consideration violates the *ex post facto* clause. Three have held that it does, though the Ninth Circuit's opinion was vacated on other grounds and is thus a nullity. *Rodriguez v. United States Parole Comm.*, 594 F.2d 170 (7th Cir. 1979) . . . ; . . . *Watson v. Estelle*, 859 F.2d 105 (9th Cir. 1988), *vacated* 886 F.2d 1093 (9th Cir. 1989);⁵ *Akins v. Snow*, 922 F.2d 1558 (11th Cir. [1991]), *cert. den.* . . . 111 S.Ct. 2915 . . . ; *but see Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), *cert. den.* . . . 112 S.Ct. 1516.⁶

Examination of the cases cited in *Roller*, with the exception of *Bailey*, shows that each, as the Ninth Circuit did in the instant case, assumed without proof in the record that the chances of parole are increased if more hearings are held. Each proceeds to judgment without a positive showing of detriment to the inmate, thus failing to meet the second prong of *Weaver*. *Akins v. Snow*, *supra* at 1563. In each of these cases, and in the instant *Morales* opinion, the appellate courts rely on suppositions. For example, in *Rodriguez v. United States Parole Comm.*, *supra* at 176, the word "might" is the operative word.

Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that

⁵ It is odd that the Fourth Circuit counted the Ninth Circuit in its camp on the basis of *Watson I*, 859 F.2d 105. As noted in the *Roller* opinion, *Watson II* vacated *Watson I* and reversed *Watson I*'s conclusions. 886 F.2d 1093-1094.

⁶ Other listings of relevant cases are contained in *Akins v. Snow*, *supra* at 1564, fn. 12 and U.S. Parole Commission Guidelines for Federal Offenders, 61 ALR Fed. 135, 155-159 (1983).

he is not suffering a penalty when even though he is eligible for parole and *might be released* if granted a hearing, he is denied that hearing.

None of these decisions relies on actual proof of detriment. *Rodriguez* simply assumes that fewer hearings must be detrimental. *Akins* assumes that because an eligibility hearing is part of the process which leads to parole, fewer hearings are detrimental. *Roller* compounds the error by confusing detriment with the inmate's subjective negative reaction to being in prison.

None of these cases comes to grips with the issue of detriment in the manner that *Jackson* does. In *Weaver*, the reduction in "gain-time" accumulation *must inevitably* lengthen the term of imprisonment. No inevitable result flows from a decrease in the frequency of parole eligibility hearings and there is nothing in the record approximating the kind of proof of detriment which appears in *Weaver* or lack of proof of detriment in *Jackson*.⁷

⁷ The nature of proof of ex post facto violation has recently been explored by the Ninth Circuit. *Powell v. Ducharme*, 998 F.2d 710 (9th Cir. 1993) involved a claim that under a new parole law the inmate had to be considered for parole at the end of 30 years. The inmate contended this meant that he could not be paroled before the end of this term. However, the Ninth Circuit found that the parole board could redetermine the inmate's discretionary minimum term at any time, including prior to the expiration of his discretionary minimum term.

Whether the "likelihood" of an earlier parole hearing has been diminished is a question that cannot be answered. It is impossible to make a quantitative comparison between [the new law], requiring a parole hearing at a certain date, and [the former law], which left such a determination to the unfettered

The Ninth Circuit has erred in ordering two more hearings every three years than required by the California Legislature on the basis of mere supposition. There is nothing in the record to indicate that an inmate who has committed the horrendous crimes contained in this record would be deprived of an earlier parole because his parole suitability hearings come every third year instead of annually. There is no inherent relation between the number of hearings and parole because frequency of appearance does not imply improvement of character. It is the nature of the individual which counts and the findings required by statute for extension of the hearings reflect the exercise of the inherent discretion of the Board to make evaluations and predictions of suitability for parole. Jt. App. at 17, 19-20. Indeed, if the Board in its discretion finds that "it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding" (Jt. App. at 9), *that finding directly and positively negates any inference of prejudice to the inmate which might otherwise be made on a silent record*. It is inconceivable that any reasonable person could find that respondent would be ready for parole in the year immediately following the completion of his

discretion of both the superintendent of the institution and the Board. . . . Such predictions of how the superintendent or the Board would have exercised their discretion have no basis in law.

Id. at 715. Put another way, speculation cannot be used to determine whether a new law prejudices an inmate.

minimum term of imprisonment given the record in this case.⁸

A review of the Board's findings indicates there was more than ample reason to postpone the next annual hearing. These findings show that annual hearings would be an exercise in futility for all. The Board findings, in light of the facts before it as to respondent's crimes and personality, are unimpeachable. *Therefore, respondent was not detrimentally affected by postponement because he had no "reasonable" expectation that the next annual hearings, were they to be held, would result in the granting of parole.*

It is clear that the timing of the hearings does not alter the fundamental discretion of the Board to grant parole, especially in light of the determination made by the Board when the decision to utilize section 3051.5(b)(2) was made. Where the alteration in parole procedures does not vitiate "individualized consideration" from the parole board, there is no ex post facto issue. *Eason v.*

⁸ If respondent had been found *suitable* for parole, his base term would have been set by reference to a matrix of facts concerning the crime and the victim. Jt. App. at 19-21. Even judged in the best possible light, respondent's basic sentence would be 19 years or more, given the abundance of circumstances in aggravation of the base term, e.g. that the victim was aged and therefore particularly vulnerable; the victim was respondent's wife and therefore respondent had a special relationship of confidence and trust with the victim; the corpse was abused, mutilated, or defiled; respondent went to great lengths to hide the body; and respondent was on parole at the time the crime was committed. Jt. App. at 24-25. Therefore, without engaging in undue speculation, it appears that respondent, even if he had been granted parole, would not have been released until 19 years after his 1982 sentencing.

Dunbar, 367 F.2d 381, 382 (9th Cir. 1966), *cert. den.* 386 U.S. 947; *Zeidman v. U.S. Parole Comm.*, 593 F.2d 806, 808 (7th Cir. 1979); see *Rifai v. U.S. Parole Comm.*, 586 F.2d 695 (9th Cir. 1978); *Ewell v. Murray*, 11 F.3d 182, 484 (4th Cir. 1993). Where, as here, an inmate sentenced to an indeterminate term has no legitimate entitlement to parole on a date certain, the denial of parole itself, let alone the denial of a parole suitability hearing, cannot constitute an ex post facto application of law. See *Malek v. Haun*, 26 F.3d 1013, 1016 (10th Cir. 1994).

Where a parole rule is not so overly intrusive that it substantively affects the review standard, it is deemed procedural⁹ and there is no ex post facto violation. *Griffin v. State*, 433 S.E.2d 862, 864 (S.C. 1993), overruling *Gunter v. State*, 378 S.E.2d 443 (S.C. 1989); see *Freeman v. Comm. of Pardons & Paroles*, 809 P.2d 1171, 1176 (Ida. 1991). Given the discretion exercised by the Board which is embodied in the statutory-required findings, the change from annual hearings is merely procedural. *But see Flemming v. Oregon Board of Parole*, 998 F.2d 721 (9th Cir. 1993).

Recent Ninth Circuit rulings, including *Powell*, *Flemming* and *Morales*, indicate that there is substantial ambiguity about what comprises substantial harm for the purposes of determining an ex post facto issue. In particular, the Ninth Circuit seems to be grasping at some yet-

⁹ *Morales* directly contradicts *Jackson* as to whether the procedural classification is of any legal moment. *Morales*, *supra* at fn. 5.

unarticulated test for prejudice and simultaneously rejecting the utilization of discretion as a factor of consequence.¹⁰

However, it is doing so in direct contradiction of the holdings of the California Supreme Court and at least one of the federal courts of appeal. Moreover it does so in

¹⁰ The number of recent Ninth Circuit published cases on ex post facto laws is extraordinary. *E.g. U.S. v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *U.S. v. Walker*, 27 F.3d 417 (9th Cir. 1994). Three of these cases present situations similar to the instant case.

Flemming v. Oregon Bd. of Parole, 998 F.2d 721, 724-727 (9th Cir. 1993) holds that a lessening of the amount of possible reduction in sentence from 20% of the term to a maximum of seven months was a violation of the ex post facto clause. In other words, a palpable reduction in time was created by the change in the cap on sentences. This case is obviously of little relevance to the instant case because it deals directly with time actually served in the same manner as the issue of credits for time served. *See Weaver v. Graham, supra*.

Nulph v. Faatz, 27 F.3d 451, 454 (9th Cir. 1993) is similar to *Flemming* in that *Nulph* involved a palpable change in the method of calculating parole dates. A law enacted after the inmate's crime eliminated a more favorable method for determining the matrix range for offenders sentenced to consecutive terms. Therefore the inmate could point to a definite change in his sentence. *See also U.S. v. Johns*, 5 F.3d 1267, 1269 (9th Cir. 1993).

Powell v. Ducharme, 998 F.2d 710, 715 (9th Cir. 1993), was issued by the Ninth Circuit three days before *Flemming*. *Powell* states that there was no violation of the ex post facto clause because the inmate was still subject to the discretion of the parole board as to when he received a parole hearing. *Powell* therefore presents an instance where the Ninth Circuit found no showing of detriment in the change in parole structure. *See* fn. 8, *supra*.

apparent ignorance of the ameliorative and responsible requirement of findings for postponement directed by the California Legislature. This Court must indicate, once and for all, what harm is and how it may be measured for ex post facto purposes.

CONCLUSION

The Ninth Circuit erred in this case because it substituted a supposition of harm for the showing of substantial detriment required by *Weaver*. The Board has been given discretion to determine parole suitability upon certain statutory criteria and to defer future hearings upon certain statutory criteria. The Ninth Circuit has upset the structure of paroles within the state by micromanaging the timing of hearings without any showing of possible detriment to the inmate amounting to *Weaver* second prong harm. *In doing so, the Ninth Circuit has chosen to ignore the fact that the statutory findings mandated by state law clearly establish that there is no prejudice to the inmate from the postponement.*

The Ninth Circuit must not be permitted to find detriment without an affirmative showing of prejudice to respondent. The "logic" utilized by the Ninth Circuit in the instant opinion is no more than wishful thinking and makes a mockery of the *Weaver* analysis.

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